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# Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard

By VIVIANA WAISMAN\*

In early January of 2010, Spain's Ministry of the Interior announced that an ongoing operation by the national police had broken up two major trafficking mafias that trafficked over 1,000 women for forced prostitution.<sup>1</sup> Similarly in 2006, the same Ministry announced that in a two-year period they had "liberated" 3,035 foreigners who were forced into prostitution — victims of trafficking in human beings.<sup>2</sup> What happened to these women? What options were available to them once they were freed from their traffickers? What legal status are these women afforded in Spain? Does Spain meet its obligations to respect, protect, and promote the human rights of women who are trafficked into Spain and are thus within its national jurisdiction?

Victims of trafficking suffer from gender discrimination and a host of other human rights violations, including infringements of the right to live free of violence, the right to physical integrity, the

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1. Mónica Cebeiro Belaza, *Dos golpes contra la explotación sexual en Andalucía*, El País, Nov. 21, 2001, [http://www.elpais.com/articulo/sociedad/golpes/explotacion/sexual/Andalucia/elpepusoc/20100111elpepisoc\\_4/Tes](http://www.elpais.com/articulo/sociedad/golpes/explotacion/sexual/Andalucia/elpepusoc/20100111elpepisoc_4/Tes) (Spain).

2. Charo Nogueria, *España figura entre los principales destinos del tráfico de personas, según la ONU*, El País, Apr. 30, 2006, [http://www.elpais.com/articulo/sociedad/Espana/figura/principales/destinos/trafico/personas/ONU/elpepisoc/20060430elpepisoc\\_9/Tes/](http://www.elpais.com/articulo/sociedad/Espana/figura/principales/destinos/trafico/personas/ONU/elpepisoc/20060430elpepisoc_9/Tes/) (Spain).

right to liberty, the right to freedom of movement, the right to family life, the right to health, specifically reproductive health, and even at times the right to life. In addition to the gender discrimination and other human rights violations that they face, women who are trafficked often belong to marginalized groups (e.g., based on their economic status and/or their ethnic, religious, or racial identity), subjecting them to multiple and intersectional discrimination. Women who are trafficked for exploitation are subjected to human rights violations in the country of origin, during their migration, and again in the destination country. At the same time, they may risk serious repercussions if they return home (after escape or when trafficking networks are dismantled), such as reprisals or retaliation from trafficking mafias, the possibility of being re-trafficked, and severe community or family exclusion. Furthermore, the families of the victims in the country of origin are often at risk of violence from the mafias.

Just as it is clear that victims of trafficking suffer a host of human rights violations, it is equally apparent that States have at least a theoretical legal obligation to protect the rights of women who have been trafficked for exploitation and find themselves outside of their native territory. The rights that are violated when women are trafficked – and the associated State obligations to protect these rights – are included in numerous international human rights treaties, the majority of which are signed by Spain, as well as the majority of receiving states in Europe.<sup>3</sup>

Together with these instruments, specific regional agreements address the rights of trafficked persons. Most important of the regional agreements are the Council of Europe Convention on Action against Trafficking in Human Beings<sup>4</sup> and the Council

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3. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. doc. A/RES/34/180 (Dec. 16, 1979) [hereinafter CEDAW] (ratified by Spain on Jan. 5, 1984); International Covenant on Civil and Political Rights G.A. Res. 2200A (XXI), U.N. Doc. 2200A (XXI) (Dec. 16, 1966) [hereinafter ICCPR] (ratified by Spain on Apr. 27, 1977); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200 (XXI) (Dec. 16, 1966) [hereinafter ICESCR] (ratified by Spain on Apr. 27, 1977); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (ratified by Spain on Oct. 21, 1987); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106 (XX) A-B (Dec. 21, 1965) (ratified by Spain on Sept. 13, 1968).

4. Council of Europe Convention on Action against Trafficking in Human

Directive 2004/81/EC of April 29, 2004. This directive covers the issuance of residence permits to third-country nationals who are victims of human trafficking or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.<sup>5</sup> More general regional human rights instruments, like the European Convention on Human Rights (ECHR),<sup>6</sup> offer an additional set of rights, thereby creating further obligations for Spain and other States Parties to these conventions. Trafficked women not only have a right to protection from the state, but as victims of human rights, they have an international legal right to adequate and appropriate remedies.<sup>7</sup>

Complicating this situation is the fact that these violations are committed most frequently by non-state actors. While States have an obligation to refrain from violating human rights, they also have an obligation to ensure that human rights are not violated by others. In the context of trafficking in Spain, human rights violations are inflicted most often by the mafias and networks that traffic women for sexual exploitation. It is more difficult to determine the limits of State responsibility in situations like this, when violations are committed by third-party actors.

To further understanding of this difficult situation, this paper examines the existing legal protections available to trafficked women, using Spain as an illustrative case study.<sup>8</sup> The author finds that the lack of a comprehensive legal framework to protect the victims of trafficking leaves this population vulnerable to further violations. In response, she sets forth a proposal for defining the

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Beings, May 16, 2005, C.E.T.S. No. 197, *available at* [http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp#TopOfPage).

5. Council Directive 2004/81, 2004 O.J. (L 261) 19, *available at* <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0019:0023:EN:PDF> (EU).

6. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 (ratified by Spain on Oct. 10, 1979) [hereinafter ECHR].

7. U.N. Econ. & Soc. [ECOSOC], Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 13 (May 20, 2002).

8. Spain is known as a destination country for trafficked women, but due to its proximity to Africa and to its linguistic and cultural ties with Latin America, it is also often a transit country. Although this paper focuses on Spain, the legal gap that is revealed when examining the protections available to trafficked women is present in similar ways in many receiving States, both within Europe and in other regions.

obligations of receiving States to protect and offer remedies to victims of trafficking within their jurisdictions. This new approach utilizes a due diligence standard framework that obligates States to meet their international human rights obligations by granting legal residence to victims of trafficking.

### I. Background on Trafficking

The United Nations Protocol on Trafficking to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>9</sup> defines “trafficking in persons” as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>10</sup>

Trafficking of persons for exploitation clearly creates a complex human rights situation, which necessarily requires a multifaceted approach to both effectively combat trafficking and to offer protection and remedies to victims. In recent years, there has been much work accomplished that has advanced the fight against trafficking both in national and international spheres. In 2000, the UN Protocol on Trafficking became the first international instrument to address trafficking from a holistic perspective, focusing on prevention, prosecution, and protection. As mentioned above, there are two other regional instruments that address trafficking of human beings – the Convention on Action against Trafficking and the Council Directive 2004/81/EC of April 29, 2004.

Despite many legislative and theoretical advances, trafficking of human beings is one of the fastest growing criminal activities in the world. According to the 2009 Report submitted by the Special Rapporteur on trafficking in persons, economically speaking,

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9. United Nations Convention against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000) [hereinafter UN Protocol on Trafficking].

10. *Id.* at art. 3 (a).

trafficking in persons has become a global business, reaping huge profits for traffickers and organized crime syndicates, generating massive human rights violations, and causing serious problems for Governments.<sup>11</sup> The United Nations has classified the trafficking of human beings for exploitation as the new form of slavery – a practice that affects all regions and countries, whether as countries of origin, transit countries, or destination countries.<sup>12</sup>

To comprehend the difficulties faced by women who survive this experience of exploitation and find themselves in a new and still vulnerable position in the country of destination, it is necessary to understand all aspects of this trade – who is being trafficked (and by whom), to and from where, how, for what purposes, and with what consequences. Since the domestic situation is interactive with the international system – and is often independently important as well, due to the central role of local political factors – this paper presents the situation in Spain to provide an example of a national context.

It is difficult to determine exactly how many people are trafficked globally. In Spain, as in other countries, trafficking involves clandestine and illegal activity, widespread violence directed at the victims, and often violence directed at victim's families in their country of origin.<sup>13</sup> As a result, victims are reluctant to report crimes to the authorities. They are also difficult to locate through other means, as trafficked women are often stripped of their passports upon arrival in the destination country and given a cell phone by the traffickers in order to control their whereabouts. Organizations attempting to conduct fact-finding and other work

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11. The Office of the United Nations High Commissioner for Human Rights [OHCHR], *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶¶ 6, 10, U.N. Doc. A/HRC/10/16 (Feb. 20, 2009) (prepared by Joy Ngozi Ezeilo [hereinafter OHCHR Report]).

12. *Id.*

13. One Romanian woman, who was captured in Romania when she was 16, managed to escape from her traffickers in Spain and denounced them. Because she was a minor, she was tortured by the Spanish authorities and her family in Romania was threatened. Mónica Cebeiro Belaza, *Los chulos amenazan a mi familia*, El País, Nov. 8, 2009, [http://www.elpais.com/articulo/sociedad/chulos/amenazan/familia/elpepusoc/20091108elpepusoc\\_4/Tes](http://www.elpais.com/articulo/sociedad/chulos/amenazan/familia/elpepusoc/20091108elpepusoc_4/Tes) (Spain); the father of a Nigerian woman victim of trafficking for sexual exploitation, who denounced the traffickers, was murdered in Nigeria. Mayka Navarro, *Asesinado en Nigeria el padre de una joven explotada en España*, El Periódico, Sept. 26, 2008, [http://www.elperiodico.com/default.asp?idpublicacio\\_PK=46&idioma=CAS&idnoticia\\_PK=546937&idseccio\\_PK=1021](http://www.elperiodico.com/default.asp?idpublicacio_PK=46&idioma=CAS&idnoticia_PK=546937&idseccio_PK=1021).

with trafficked women also face a real danger from the organized networks and mafias involved in this trade. Exacerbating the situation is the marked lack of political will to date, on the part of governments, to collect national-level data regarding this population.

All of these factors, combined with the methods by which women are trafficked, make data collection extremely difficult.<sup>14</sup> In fact, the range of estimates varies to such an extent that higher estimates are as much as ten times that of lower estimates.<sup>15</sup> Despite the fact that estimates vary by several million persons, the International Labor Organization, in a comprehensive report, calculates that approximately 2.4 million persons are trafficked each year; 43% for commercial sexual exploitation, of which 98% are women and girls.<sup>16</sup> An estimated 500,000 women are trafficked annually to Western Europe.<sup>17</sup> Despite the fact that in December of 2008, the Council of Ministers approved an Integral Plan to Combat Human Trafficking, there are no government statistics available regarding the number of persons that are trafficked to Spain specifically. This plan is meant to lay the groundwork for the creation of a national legal framework to address the human rights violations and the protection of trafficked women but, to date, has not produced positive results.

In 2007, the last year that the *Guardia Civil* (one of Spain's law enforcement agencies) released statistics regarding women victims of trafficking for sexual exploitation, the largest number of trafficked women came from Latin America: mostly from Brazil, Colombia, Paraguay, and the Dominican Republic.<sup>18</sup> The next

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14. OHCHR Report, *supra* note 11; International Labour Organization [ILO], International Labour Office, International Labour Conference 98th Session 2009, Geneva, June 3-19, 2009, *The cost of coercion*, ¶¶ 51-53, [http://www.ungift.org/docs/ungift/Steering-committee/ILO\\_Report\\_2009.pdf](http://www.ungift.org/docs/ungift/Steering-committee/ILO_Report_2009.pdf).

15. U. N. Office on Drugs and Crime [UNODC], *Trafficking in Persons: Global Patterns*, Apr. 2006, 45, <http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf> [hereinafter *Trafficking in Persons*].

16. ILO, International Labour Office, International Labour Conference 93rd Session 2005, Geneva, May 31-June 16, 2005, *A global alliance against forced labour*, p. 14-15, <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

17. Proyecto Esperanza, *Memoria 2004* (Annual Report) 4 (2004), available at <http://www.proyectoesperanza.org/pdf/Memoria%202004.pdf>.

18. 3, 277 women from Brazil, 1,642 women from Colombia, 1493 women from Paraguay and 1,201 women from Dominican Republic. Archive of the Ministerio de

largest group of trafficked women to Spain came from East and Central Europe – the major number from Romania and then from Russia, Bulgaria and the Ukraine.<sup>19</sup> Women are also trafficked from other countries, such as Nigeria and Morocco.<sup>20</sup>

Nigerian women trafficked to Spain are, on average, between the ages of 15 and 40 years old. As an example, one of the distinctive characteristics of the Nigerian trafficking rings is the use of physical violence employed against the women. Trafficking rings also employ tactics of severe psychological abuse through the practice of voodoo and traditional hierarchies.<sup>21</sup> These tactics, as well as threats to their families in the country of origin, keep the women in a state of terror.<sup>22</sup>

Though women are trafficked from many different countries and regions, most are brought to Spain and other destination countries for sexual exploitation.<sup>23</sup> Besides prostitution, women are exploited for agricultural work and domestic service, among other activities.<sup>24</sup> Available statistics for Western Europe show that out of 80 sources, 67 were trafficked for sexual exploitation and 13 for forced labor.<sup>25</sup>

When examining the protections available and the obligations of the State to people who are trafficked, it is important not to conflate the issues of immigration and trafficking – although there is undoubtedly a link. As the Special Rapporteur on Gender Violence explains:

Because of the lack of independent legal protections afforded to both documented and, in particular, undocumented immigrant

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Igualdad [www.inmujer.migualdad.es/mujer/mujeres/cifras/tablas/W868.xls](http://www.inmujer.migualdad.es/mujer/mujeres/cifras/tablas/W868.xls) (last visited Mar. 28, 2010).

19. 3,497 women from Romania, 399 women from Russia, 204 women from Bulgaria, and 190 women from Ukraine. Archive of the Ministerio de Igualdad [www.inmujer.migualdad.es/mujer/mujeres/cifras/tablas/W868.xls](http://www.inmujer.migualdad.es/mujer/mujeres/cifras/tablas/W868.xls) (last visited Mar. 28, 2010).

20. 329 women from Nigeria and 374 women from Morocco. Archive of Ministerio de Igualdad, [www.inmujer.migualdad.es/mujer/mujeres/cifras/tablas/W868.xls](http://www.inmujer.migualdad.es/mujer/mujeres/cifras/tablas/W868.xls) (last visited Mar. 28, 2010).

21. Women's Link Worldwide, *Los Derechos de las Mujeres Migrantes: Una Realidad Invisible*, at 8, 24 (Feb. 2009), available at [http://www.womenslinkworldwide.org/pub\\_migrantwomen.html](http://www.womenslinkworldwide.org/pub_migrantwomen.html).

22. *Id.*

23. *Id.*

24. Proyecto Esperanza, *supra* note 17.

25. Trafficking in Persons, *supra* note 15, at 93.



women, exacerbated by immigrant women's social and cultural marginalization, immigrant women are placed by the State in situations of enhanced vulnerability to violence. Women move and are moved, consensually and non-consensually, movement is increasingly impeded by legal obstacles erected by the State and thus women and their movement are increasingly forced underground.<sup>26</sup>

Nevertheless, despite creating potentially similar situations of vulnerability, trafficking differs from smuggling and other forms of migration that might also lead to human rights violations. Smuggling is defined as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or a permanent resident."<sup>27</sup> Both migrant smuggling and human trafficking involve migration, and distinguishing between the two often proves difficult — in fact, in many cases trafficking initiates in a smuggling scheme. However, if initial consent of the migrant is gained via any element of deception or coercion, or if exploitation takes place subsequent to the consent, the situation must be categorized as trafficking and not as smuggling.<sup>28</sup>

In the end, due to the manner in which the women are "moved" from one place to another, trafficked women fall into a separate category and face a host of human rights violations that are specific to trafficking.<sup>29</sup> Trafficking may sometimes amount to a form of torture and cruel, inhumane or degrading treatment. In many circumstances the mode in which a woman is trafficked restricts her freedom of movement through abduction, incarceration, or the confiscation of her passport or other

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26. U.N. Comm'n on Human Rights [UNHCR], *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 35 U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (prepared by Radhika Coomaraswamy) [hereinafter *Human Rights of Women*].

27. *Trafficking in Persons*, supra note 15, at 50.

28. *Id.* at 51.

29. At the same time, as one eminent feminist scholar explained, "[i]t is important to recognize that the women in predominantly female migration streams are not only reacting to circumstances beyond their control, they are often active participants who seek to shape their own destinies and better their lives. The choice to migrate is frequently a conscious attempt at self-determination." Thus the "greatest challenge is to strike a delicate balance between protecting the female migrant from abuse while simultaneously liberating her to control her own destiny." Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 50 (1998).

identification.

Trafficking of human beings for exploitation occurs in a myriad of ways. Radhika Coomaraswamy, the first UN Special Rapporteur on "Violence against Women, Its Causes and Consequences," created a typology that can be applied to other forms of exploitation for which women migrate or are trafficked. Building on the Global Survival Network's work in identifying the types of situations that result in women's and girls' involvement in the sex trade, Coomaraswamy identified four categories of women's experience entering into trafficking.<sup>30</sup>

The first two categories include women who have little to no information about their ultimate occupation. The first group is comprised of women who have been completely coerced or duped into migrating. As such, they have no notion of where they are going or the nature of the work they will be forced to undertake at their destination. The second group includes women who are told "half truths" by their traffickers about their future employment and then, once in the destination country, are forced to do work to which they have not agreed. Often, the terms of the "agreement" are substantially changed with little or no choice on the women's part. In these cases, their mobility and power to change the situation are highly restricted by debt bondage, confiscation of their travel documents, and threats of violence.

The last two categories consist of women who have some clear understanding of their future work. The third group is comprised of women who are informed about the type of work they will undertake at their destination, even though it is not desirable to them. These women see no viable economic alternative and consequently cede control to their traffickers, who exploit both their economic and legal vulnerabilities for financial gain. The fourth group, which is not classified as trafficking, includes women who are fully informed about the work they will do, do not have objections to performing it, and are in control of their own finances and have relatively unrestricted movement.<sup>31</sup>

A final situation might be added to these four categories that is a slight variation on those described above — women who set out to migrate and, due to difficulties en route, fall in the hands of

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30. Human Rights of Women, *supra* note 26.

31. *Id.* at ¶ 36.

traffickers and consequently fit into one of the categories listed above.<sup>32</sup> Importantly, as Ms. Coomaraswamy explains, this typology highlights the changing nature of the experience for women who move or are moved. The status of each woman does not necessarily remain fixed — their position may shift between the categories.<sup>33</sup>

The key is to understand that, irrespective of how, why, or where women move, they are subjected to myriad forms of violence and that “their vulnerability in terms of violations of their rights and violence against them increases as their marginalization increases.”<sup>34</sup> This paper begins from this perspective of human rights violations to examine the existing remedies, as well as the obligations of the destination States, in this migration process.

## II. Existing Protections for Trafficked Women

It is untrue that protection and remedies are completely unavailable to women who have been trafficked to Spain. However, the available legal avenues more often than not leave trafficked women unprotected due, in large part, to the difficulty in attaining legal residence in Spain under the existing laws. Without legal residence, including a work permit, women that have been trafficked remain in an extremely vulnerable situation, exposed to further violations of their rights.

Spain is a signatory to most international human rights treaties, as well as to regional conventions such as the ECHR and is thus obligated by them.<sup>35</sup> Furthermore, Spain is a Party to the Council of Europe Convention on Action against Trafficking in Human Beings, which deals specifically with obligations to trafficking victims.<sup>36</sup> At the same time, because immigration and criminal laws are within the jurisdiction of national governments, the applicable laws must be reviewed to identify and understand the existing protections that

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32. Based on information gathered during the fact-finding investigation conducted for Women's Link Worldwide, *supra* note 21.

33. Human Rights of Women, *supra* note 26, at ¶ 37.

34. *Id.*

35. See Council of Europe Convention on Human Rights, Nov. 4, 1950, E.T.S. 5, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>.

36. Trafficking in Human Beings, *supra* note 4.

fall within the national domain.

This section begins by examining the use of a crime control model to address the issue of trafficking in Spain. A crime control model commits legislation and other resources to criminal investigations aimed at dismantling trafficking networks and prosecuting offenders, with little or no attention paid to the victims of trafficking and their legal status when the networks are dismantled. This leaves women especially vulnerable to a number of potential human rights violations.

To promote awareness of existing possible protections, this section then identifies and evaluates the legal avenues that trafficked women might consider in order to attain legal residency in Spain, including recent changes in policy and law. The first two options analyzed are the possibilities of applying for asylum under Spanish asylum law or of obtaining residency based on “humanitarian grounds” under the same law. A third alternative comes from the principal of non-refoulement under the ECHR which, under certain circumstances, could prohibit the deportation of trafficked women based on the Article 3 prohibition of torture and inhumane and degrading treatment. Finally, the section explores the prospects of obtaining temporary residence — including a reflection period (sometimes called a delay period) — under Spain's immigration law for victims of trafficking.

The section concludes that, despite these theoretically available protections and remedies including recent advances in the framework, in practice, victims of trafficking in Spain are left for the most part without any access to legal residency. This leaves them unprotected in highly vulnerable situations and without the ability to seek remedies for the violations previously suffered at the hands of their traffickers.

#### ***A. A Crime and Immigration Control Model***

As in many countries, trafficking in Spain is addressed by the State from the perspective of crime and immigration control. This means that the focus of the State in relation to trafficking is to catch and prosecute the criminals who traffic people into the country. This is relevant to an analysis of the protections available to trafficking victims because crime control models focus on investigating mafias and networks and prosecuting them whenever possible — with little or no attention paid to the victims of these

mafias and networks.<sup>37</sup> Similarly, when the focus of the authorities is on immigration control, the violations suffered by trafficked women are easily overlooked, because individuals who have been trafficked are often treated as illegal immigrants. People who have often already been victims of severe human rights violations such as rape, torture, and the denial of liberty are then exposed to further violations.

It is important to note that in December of 2008, the government passed a Comprehensive Plan to Combat Trafficking in Human Beings for the Purpose of Sexual Exploitation.<sup>38</sup> Although this is merely policy and requires legislative action in order to create obligations, it demonstrates political will on the part of the current government to redress victims of trafficking. Unfortunately, the Plan only refers to trafficking for sexual exploitation leaving out victims of trafficking for other purposes such as labor exploitation.

Spanish legislation includes a range of provisions for prosecuting trafficking networks.<sup>39</sup> The mechanisms in place to protect victims of trafficking under national law are connected to these crime control efforts. Thus, within this crime and immigration control model, victims are required to cooperate with the authorities in combating organized networks to receive protection. These mechanisms and their pitfalls are discussed below.

In December of 2009, Spain modified its immigration law — changing slightly the framework applicable to victims of trafficking. Before the changes, the immigration law in Spain contemplated the possibility of granting temporary residence to victims of trafficking if they were willing and able to testify against their traffickers. Article 59 of the Immigration Law stated that

all foreigners who have crossed the Spanish borders outside the

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37. See, e.g., Human Rights of Women, *supra* note 26, at ¶ 7, which states Ms. Coomaraswamy's concern regarding the fact that the UN Protocol on Trafficking is based on a crime control model and thus leaves victims of trafficking unprotected.

38. See Comprehensive Plan to Combat Trafficking in Human Beings for the Purpose of Sexual Exploitation, available at <http://www.migualdad.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Contentdisposition&blobheadervalue1=inline&blobkey=id&blobtable=MungoBlobs&blobwhere=1244651910209&ssbinary=true>.

39. Council of Europe: Comm'n for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Spain and the Basque Country*, 5-8 February 2001, Mar. 9, 2001, CommDH(2001)2, available at <http://www.unhcr.org/refworld/docid/42569a394.html>.

procedures established to do so or have once inside the Spanish territory failed to declare his or her entry and finds him or herself illegally in Spain or working without a permit, without proper documentation, or with illegal documentation may remain in the country and not be deported for having been victim of, prejudiced by, or a witness to an act of illegal trafficking of human being, illegal immigration or illegal trafficking of workers or for prostitution, in exploitation of the state of necessity of the person may be exempt of administrative sanction and will not be deported *if* she or he files a complaint with the proper authorities against the traffickers, or she or he cooperates and collaborates with police officials in the immigration brigade, contributing essential information or testifying in any legal proceedings that might take place against the traffickers.<sup>40</sup>

This provision was highly problematic for several reasons. First, the law itself imposed a harsh requirement. Any rights that a person might access to redress the human rights violations suffered as a victim of trafficking were predicated on cooperation with the police. A study conducted by the Guardia Civil<sup>41</sup> in 2001 found that only 1.12% of the victims of trafficking file a complaint with the authorities.<sup>42</sup> Thus, the law was providing alternatives to a very small number of the total trafficking victims in Spain.

The modification introduced in late 2009 adds a provision, Article 59 bis, that deals with “victims of trafficking of human beings.”<sup>43</sup> For the first time, the law grants a right to trafficking victims not conditioned on cooperation with the authorities: the right to a reflection period in accordance with the Council of Europe Convention on Action against Trafficking in Human Beings. Unfortunately, there continues to be a substantial gap in the law, primarily the lack of a regulation giving guidance to the authorities regarding how the rights recognized in this article are to be applied.

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40. Art. 59 of Ley Orgánica 4/2000, de 11 de enero, sobre Derechos y Libertades de los Extranjeros en España y su integración social (B.O.E. 2000, 10).

41. The *Guardia Civil* is a Spanish law enforcement agency whose mandate includes border patrol.

42. Guardia Civil (Sección de Investigación del Comportamiento Delictivo), *Trafico de Seres Humanos: Informe General de Situación Centrada en la Explotación Sexual*, 12 (2001), available at [http://www.aboliciondelaprostitucion.org/textos/DO\\_INF\\_guardcivil\\_TSH2001.PDF](http://www.aboliciondelaprostitucion.org/textos/DO_INF_guardcivil_TSH2001.PDF).

43. Ley Orgánica 2/2009, de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (B.O.E. 2009).

To date, the authorities in Spain work under the premise that unless a woman is willing to denounce her traffickers, she is not entitled to any rights as a trafficking victim. Unless this perception is changed, women will not be able to access any rights under the new law. This augments the ongoing problem in Spain regarding the identification of victims of trafficking. There continues to be a complete lack of law, regulation or protocol regarding how to identify a potential victim.

Another major pitfall of the statutory modification is that victims of trafficking from European community countries are left unprotected since the immigration law does not apply to them. Thus, there is no legislation addressing the violation of their rights or access to basic services required by trafficking victims for their recuperation.

Despite the modification, which grants the right to a reflection period whether or not a woman is willing or able to denounce her traffickers, authorities continue to view this as a time for the victims to decide whether to denounce and cooperate with law enforcement agencies – in keeping with the crime control model explained above.

Harder to identify by examining the law, but just as problematic, is the fact that in Spain, women who testify are not offered witness protection. Undisclosed housing and other basic needs are not covered by the state apparatus that requires their testimony to gain access to other legal remedies.<sup>44</sup> Instead, the state depends on the services of a few (mostly under-funded) not-for-profit organizations that seek to protect and offer services to this population.

Most regional initiatives within Europe (which are thus relevant for Spain) focus primarily on the crime and immigration control model. For example, in 2002, the European Council adopted the *Framework Decision on Combating Trafficking in Human Beings*,<sup>45</sup> which provides a legal structure for the prosecution of human

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44. See Ministerio de Igualdad, *supra* note 18. This states that the current laws fall short of offering protection both to victims of trafficking that wish to testify as well to law enforcement agents that investigate networks and mafias.

45. Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, 2002 O.J. (L 203) 1, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:203:0001:0004:EN:PDF>.

trafficking.<sup>46</sup> It establishes common definitions and penalties, and common procedures regarding jurisdiction, prosecution, and legal protection of victims. Similarly, the above mentioned 2004 Council Directive that addresses the topic of residence permits for victims of trafficking contemplates the options only as they relate to collaboration by the victims in the prosecution of the traffickers.<sup>47</sup>

Clearly, efforts at both the regional and national levels utilize a crime and immigration control model, with little focus on the rights of the victims. This paper, however, is not concerned with prevention and punishment. Under crime control models, prevention and punishment are addressed fairly adequately, depending on the capacity of national law enforcement. Instead, the concern of this paper is the protection and redress available to the women who are “found” when these organized crime networks are dismantled, or who somehow manage to escape their traffickers once in a receiving country, and seek protection of some sort. This aspect of human trafficking is effectively missing in crime and immigration control models and must be addressed.

#### ***B. Refugee Status as a Potential Protection Mechanism for Trafficking Victims***

Refugee law provides potential protection to victims of trafficking in Spain outside of the crime and immigration framework described above. If asylum is granted by the government the recognized refugee obtains legal residency, a work permit, and access to a host of social services.

The refugee status available in Spain is based on the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention).<sup>48</sup> Under the 1951 Convention, a person may be granted asylum if he or she can prove to have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. Victims of trafficking

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46. It is important to note that as a “Framework Decision,” this is not directly adopted by the member states, but rather obligates them to incorporate the minimum standards set by the decision in their national legislation.

47. Council Directive 2004/81 of 29 April 2004, 2004 O.J. (L 261). On the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

48. Act No. 5/1984, Regulating the Right of Asylum and Refugee Status, as amended by Act No. 9/1994 (Mar. 26, 1984) (Asylum Act), s 2(1).



may be eligible for gender related persecution — that is, asylum based on gender discrimination.

In addition to the basic asylum law, a new law passed in 2007 addressing gender equality recognizes gender discrimination as a basis for asylum in Spain.<sup>49</sup> Further, in December of 2009, the basic asylum law was modified to include gender-based asylum as a grounds for seeking refugee status.<sup>50</sup>

Gender-based asylum in refugee law refers to a range of different types of claims in which gender is a relevant factor to be considered in determining an applicant's refugee status.<sup>51</sup> In the early 1990s, Canada became the first country to recognize that women suffer from gender-specific forms of persecution that should be recognized under the 1951 Convention.<sup>52</sup> Other jurisdictions have followed, including the United States and Australia. Different forms of gender discrimination, such as rape and other forms of gender-related violence (e.g., dowry-connected violence, female genital mutilation, domestic violence, and trafficking), are acts that have been classified as modes of persecution, either by State or private actors.<sup>53</sup>

Before the new law in Spain, trafficked women could have valid claims to refugee status under the 1951 Convention.<sup>54</sup> As the United Nations High Commissioner for Refugees (UNHCR) Gender Guidelines explain, "[t]he forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death."<sup>55</sup> Furthermore, UNHCR has published guidelines specifically addressing the possibility of granting refugee

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49. Ley orgánica 3/2007, de 22 de marzo, para la Igualdad Efectiva de Mujeres y Hombres (B.O.E. 2007, 6115).

50. Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y la protección subsidiaria (B.O.E. 2009, 263).

51. U.N. High Comm'n for Refugees [UNHCR], *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

52. Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins*, 6 TEX. J. OF WOMEN & L. 181, 207 (1997).

53. UNHCR, *supra* note 51.

54. *Id.*

55. *Id.* at 5.

status to trafficked women.<sup>56</sup>

Trafficking may sometimes amount to a form of torture and cruel, inhuman, or degrading treatment. In many circumstances, the methods by which women are trafficked – including abduction, incarceration, or the confiscation of passports or other identification – restrict a woman's freedom of movement. Also, trafficked women may risk serious repercussions after an escape or upon return, such as reprisals or retaliation from trafficking mafias or individuals, the possibility of being re-trafficked, severe community or family exclusion, and discrimination. Thus, in cases where the State has been unwilling or unable to provide protection against such harm or threats of harm, a trafficked woman would be eligible for asylum.<sup>57</sup>

In order to analyze the effectiveness of this existing mechanism to truly offer protection to women who are victims of trafficking, it is necessary to examine the situation of refugee seekers in Spain, as they are intrinsically linked. The past fifteen years have witnessed a significant change in Spain's migration flows, with an increase in immigration.<sup>58</sup> In recent years, fact-finding investigations by NGOs like Human Rights Watch and Amnesty International have revealed serious violations of both Spanish immigration law and basic human rights in the processing of migrants and in their conditions of detention in Spain.<sup>59</sup> As the Spanish branch of the United Nations Office of the High Commissioner for Refugees has noted, the "national context is strongly influenced by the public concern resulting from increasing arrivals of illegal immigrants, that, mirroring developments in other EU Member States, inspire tighter and more restrictive migration control measures, which risk jeopardising the right to seek asylum of persons in need of protection."<sup>60</sup> Furthermore, a look at the number of persons that

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56. UNHCR, *supra* note 51.

57. *Id.*

58. The new immigrants are coming increasingly from Latin America, due to the linguistic and cultural ties with Spain, as well as from Africa and Eastern Europe, due to their geographic proximity.

59. See, e.g., Human Rights Watch, *Discretion Without Bounds: The Arbitrary Application of Spanish Immigration Law*, 5 July 2002, D1406, available at <http://www.unhcr.org/refworld/docid/3d2eeb695.html>.

60. UN High Comm'n for Refugees, *UNHCR Country Operations Plan 2003 - Spain*, Sept. 1, 2002, available at <http://www.unhcr.org/refworld/docid/3d941f56e.html>.

have lodged an application for asylum in recent years shows a marked decrease in the ability to access protection under this legal scheme.<sup>61</sup>

In recent years, a handful of women in Spain have been able to attain refugee status based on the claim of gender-based persecution.<sup>62</sup> In May 2005, the first woman to attain refugee status based solely on a gender discrimination claim was made public in Spain.<sup>63</sup> Since that case, others have obtained asylum based on various forms of gender discrimination, including women who fled their countries of origin due to the unwillingness or inability of the government to offer protection from domestic violence and female genital mutilation.<sup>64</sup> However, despite the fact that asylum is sometimes granted on these grounds, there is currently no system in place to track which cases are accepted and on what grounds. This clearly makes advocacy efforts on behalf of women that solicit gender-based asylum – including victims of trafficking – extremely difficult.

Importantly, despite the fact that a number of women have presented cases, Spain has not yet granted refugee status to a female victim of trafficking solely on the basis of trafficking, demonstrating the current ineffectiveness of this mechanism of protection for victims of trafficking.<sup>65</sup> In addition to the general difficulties faced by all asylum seekers in accessing this right, the current (unwritten) government policy is that victims of trafficking should not be granted asylum, given other protections available to them in the Spanish legal system – namely Article 59 (and 59 bis) of the Immigration Law, which awards temporary residence permits to victims of trafficking who are willing and able to testify against their traffickers.<sup>66</sup>

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61. See Kathleen Newland, *Drop in Asylum Numbers Shows Changes in Demand and Supply*, Migration Information Source (Apr. 1, 2005), available at <http://www.migrationinformation.org/feature/display.cfm?ID=303>.

62. Interview with Spain UNHCR office (Mar. 23, 2007).

63. *El ministro del Interior concede por primera vez asilo en España a una mujer víctima de violencia doméstica*, Notas de prensa, Ministerio del Interior, Madrid (May 31, 2005), available at [http://extranjeros.mir.es/DGRIS/Notas\\_Prensa/Ministerio\\_Interior/2005/np053103.htm](http://extranjeros.mir.es/DGRIS/Notas_Prensa/Ministerio_Interior/2005/np053103.htm).

64. See Interview, *supra* note 54.

65. The difficulties facing victims of trafficking are apparent in the details of a recent case taken up by the Spanish administration. This example is presented in Appendix A.

66. Interview with Spain UNCHR office (Feb. 15, 2007).

### *C. Subsidiary Protection on 'Humanitarian Grounds' for Victims of Trafficking*

Another possible method for trafficking victims in Spain to attain legal residency is to obtain subsidiary protection based on humanitarian grounds.<sup>67</sup> Persons applying for refugee status may solicit this as an alternative if asylum is not granted, or the government may on its own determine that the person is eligible for subsidiary protection instead of asylum.

At first glance, this "catch-all" exception seems to provide excellent protection for women who may not be able to obtain the status of refugee due to their circumstances as a trafficked person. However, this "subsidiary protection" has two important pitfalls. First and most importantly, it is discretionary, vague, not transparent, and leaves immigrants subject to the winds of the political climate. The procedures for obtaining this status, and the rights granted to a person who obtains subsidiary protection, depend on each country's law. In Spain, the Asylum Law explicitly provides for the possibility of granting subsidiary protection. Article 17, section 2, of the Asylum Law recognizes that "for humanitarian or for reasons of public interest it is possible to authorize, within the general framework of the immigration law, the residence in Spain of the asylum seeker when his or her application has not been admitted or has been denied." Furthermore, the law states that "the Ministry of the Interior, as proposed by the Inter-Ministerial Commission of Asylum and Refugees, may authorize the residence in Spain of an individual whenever serious and well-found motives are present that indicate that the person's return to his or her country of origin poses a danger for the life or physical integrity of that person."<sup>68</sup> Although this subsidiary protection does grant residency, it is not accompanied by the host of rights that are available to those granted refugee status under the 1951 Convention.

The second shortfall of the subsidiary protection is, because the person does not receive refugee status, no record of the grounds on which her residence is granted is recorded. This makes it impossible

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67. Art. 4 of Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria (B.O.E. 2009, 263).

68. El Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el Reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del Derecho de Asilo y de la condición de Refugiado, modificada por Ley 9/1994, de 19 de mayo (B.O.E. 1995, 52).

for advocates looking to achieve protection to track or use the precedent set by these decisions. This inability to follow and organize residence decisions further adds to a system that is neither coherent nor systematic in the way that it treats women who have suffered severe human rights violations. As one scholar explains, "[a]t the moment, the vagueness of what constitutes sufficient suffering, a real risk or 'exceptional circumstances,' leave both potential applicants and states uncertain about the extent of their rights and obligations."<sup>69</sup>

#### ***D. Non-refoulement Obligations Under the European Convention of Human Rights***

Outside of refugee law, another protection mechanism available to victims of trafficking comes from the ECHR. Spain is a signatory to this Convention and the decisions of the European Court of Human Rights are therefore binding on the country.

Article 3 of the Convention, which prohibits "torture or inhuman or degrading treatment or punishment," may be invoked to stop deportation if the person can demonstrate that their right to a dignified existence would likely be violated if they were returned to their country of origin.<sup>70</sup> Thus a victim of trafficking facing deportation may invoke Article 3 in national courts to stop the procedure. This avenue of protection suffers from the same pitfalls as those of subsidiary protection. Furthermore, even if protection was afforded, preventing a deportation, it is not clear what alternatives would then be available for the woman to remain legally in Spain.

#### ***E. Conclusion***

An examination of the current legal framework in Spain demonstrates that women are left unprotected by this patchwork of norms that address crime, immigration, asylum, and deportation issues. There is no coherent framework to effectively protect trafficking victims who have broken away from the trafficking mafias or networks. As a study by the Guardia Civil in Spain

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69. U.N. High Comm'n for Refugees [UNHCR], Evaluation and Policy Analysis Unit, *Working Paper: Fleeing Violence and Poverty: non-refoulement obligations under the European Convention of Human Rights* 32, Working Paper No. 111 (Jan. 2005), available at <http://www.unhcr.org/41f8ef4f2.html>.

70. *Id.* at 1.

concluded, when women are presented with the alternatives available in the Spanish legal system, they find that they are in a legal vacuum, unable to access legal residency or a work permit. This leaves trafficking victims unable to pay the inordinate debts owed to their traffickers – or to earn enough income to live in Spain or send money to their families in their countries of origin.<sup>71</sup>

### III. State Obligations and Due Diligence

As the previous section demonstrates, the current legal framework leaves women who have been trafficked into Spain almost entirely unprotected, and thus exposes them to further human rights violations. The lack of effective protections for trafficking victims highlights the fact that Spain is not meeting its obligations under international human rights law. Thus the question is: What must Spain do to meet its responsibility? More broadly, what standard should be employed to define this obligation? The answer must provide a framework that both ensures that women are not left in an unprotected situation (making them vulnerable to further human rights violations) and provides a mechanism to hold a State accountable for any breach of its duty.

This section examines current international law to identify Spain's responsibility to provide protection and remedies for human rights violations committed by non-state actors. The section then explores how international tribunals and experts have shaped the law utilizing a "due diligence standard" to determine when a State may be held responsible for violations committed by third parties. The importance of the due diligence standard in holding States accountable for gender-specific violations of human rights is highlighted, examining the groundbreaking case from the Inter-American Commission on Human Rights, which applied the due diligence standard for the first time in a gender violence case. The section then demonstrates how this standard has become accepted in international human rights law (outside of the Inter-American system), including its use as a standard by the European Court of Human Rights – jurisprudence that is directly binding on Spain.

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71. Guardia Civil, *supra* note 42, at 12.

### A. *State Responsibility for Human Rights Violations by Non-state Actors*

Traditionally, human rights law has been concerned with violations committed by States or agents of the State acting within the scope of their duty. However, State responsibility has evolved considerably and there is now a body of international law, treaties, cases, and secondary sources that clearly affirm the view that State responsibility exists not only when the State directly commits a human rights violation, but also when the State fails to protect those under their jurisdiction from such violations.<sup>72</sup>

Thus States are obligated to both respect and protect rights. They must not only refrain from committing violations themselves through their agents and apparatus, but also must ensure that rights are not abused by others. This requirement to promote human rights in a wider sense clearly includes impeding other individuals from violating human rights, though this obligation can be difficult to identify and enforce. This is illustrated by the fact that, "in principle, states are not responsible for the actions of private persons or agencies .... States are responsible, however, for their failure to meet their international obligations, even when the substantive breaches originate in the conduct of private persons."<sup>73</sup>

The recognition of State responsibility for the acts of private entities has been fundamental in the development of human rights law as it applies to violations specifically suffered by women, and it can be applied to the violations suffered by trafficked women. As has been well-documented by feminist juridical scholars, the system of law in general, and international law in particular, reproduces the ideological construct known as the public/private dichotomy.<sup>74</sup>

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72. See, e.g., Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) [hereinafter Velásquez Rodríguez]; See U. N. Econ. and Soc. Council, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, (Aug. 26, 2003) U.N. Doc. E/CN.4/Supp.2/2003/12/rev.2; See PHILIP ALSTON, *NON-STATE ACTORS AND HUMAN RIGHTS* (2004).

73. Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 151 (1994).

74. The public realm entails: law, economics, the workplace, politics, the functions of the state; the private realm consists of home and children. Culturally, more importance is attached to the public realm. "This division, however, is an ideological construct rationalizing the exclusion of women from the sources of power." Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. OF INTL L. 613, 629 (1991).

Historically, the law's concerns have been limited to the public realm, primarily to relations between nation states, avoiding national or "domestic" issues and thus leaving the violations suffered by women invisible to the legal mechanisms available for redress.

For example, under international law, until recently, the definition of torture required that it be committed by a public official.<sup>75</sup> Further, only within the last fifteen years has rape begun to be considered an act of torture by some tribunals.<sup>76</sup> The reluctance to consider rape as torture was founded on the notion that rape is a "private" form of violence between the aggressor and the victim, and thus not within the jurisdiction of a tribunal that is examining State-committed or State-sanctioned human rights violations. This model, of course, leaves individuals unprotected when any violation to bodily integrity is committed in a "private" context — as, for example, in the case of domestic violence.

Due to the fact that "State action" is required to hold States accountable for human rights violations, State action or inaction is a threshold for bringing any claim before a national or an international tribunal.<sup>77</sup> Thus, the establishment of State responsibility for what until recently have been seen as "private" acts of discrimination or violence — as well as practices so systemic that they appear invisible — is a crucial step in providing protection and redress for women victims of trafficking.<sup>78</sup> The

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75. *Id.*

76. See, e.g., *Prosecutor v. Delali*, Case no. IT-96-21-T, Judgment (Nov. 16, 1998), available at <http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf>.

77. Examples of inaction in the case at hand could be the lack of a legal framework or the lack of enforcement in a way that provides protection to victims of trafficking.

78. See *María da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 (2001) [hereinafter *María da Penha*] available at <http://www.cidh.oas.org/annualrep/2000eng/chapterIII/merits/Brazil12.051.htm>. In this case, the Inter-American Commission on Human Rights found that Brazil's failure to prosecute the attempted murder of *María da Penha Maia Fernandes* by her husband more than fifteen years after criminal charges were filed represented a pattern of state-condoned violence against women in violation of the right to a fair trial, the right to equal protection, and the right to judicial protection. The Commission further found violations of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), including the right to be free from violence, women's rights to enjoy all internationally protected human rights, and the state's obligation to condemn violence against women. See generally Org. of Am. States,



initial human rights violations suffered by trafficked women are usually committed by private actors — the individuals who make up the networks and mafias that traffic women for exploitation. Because trafficking often involves clandestine immigration, not only are the violations committed by non-state actors, but they are also “hidden” since the activity of trafficking persons is illicit. As a result, neither the victims nor the violations they suffer are readily visible.

As Professor Rebecca Cook explains,

[l]awyers seeking redress for the suffering of women look to the states within which the suffering occurs to bear legal responsibility for it. They must establish that the suffering is an internationally recognized and a justiciable wrong, and that, under the state responsibility doctrine, the state bears identifiable duties of prevention and redress.<sup>79</sup>

In terms of State responsibility for violations committed by traffickers, one would need to establish first that the “suffering” (the violations suffered as a result of the trafficking) is an internationally recognized wrong that can be brought to the courts, and second that the State in question (here, the receiving state, Spain) has identifiable duties under international law to protect the trafficking victims and to provide access to redress — that is, to provide adequate remedies for the victims.

***B. A Standard to Hold States Accountable for Violations by Non-state Actors: Due Diligence***

International human rights law clearly affirms that States have a responsibility to respect, protect, and promote human rights, even when violations are committed by non-state actors. Yet a State clearly cannot be held responsible for all human rights violations perpetrated by non-state actors that occur within its jurisdiction. Attempts to define the contours of State obligations have led to the development of important jurisprudence and scholarship that describe how to set the standard for measuring State responsibility in situations where non-state actors commit human rights violations.

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*Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, 33 I.L.M. 1534 (June 9, 1994) [hereinafter *Convention of Belém do Pará*].

79. Cook, *supra* note 73, at 137.

A due diligence standard can be utilized to delineate what a State must do to meet its obligations to protect human rights when violations occur. The development of due diligence as a standard to measure State compliance with human rights law is highly significant because it provides a framework for determining the State's minimum obligations in the face of human rights violations by non-state actors.

International human rights tribunals have expanded the law of State responsibility beyond its classical origins through international human rights conventions. Currently, it is accepted that States are obligated to respond appropriately to potential or actual private conduct, and "to organize the governmental apparatus and, in general all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."<sup>80</sup>

### C. *History of the Due Diligence Standard*

The due diligence standard can be traced back in international law to seventeenth century writers, such as Grotius, who reference this measure.<sup>81</sup> While the concept of due diligence is not new, its present-day application to determine whether States are meeting their obligations under international human rights law was introduced by the Inter-American Court of Human Rights in its 1988 judgment in the *Velásquez Rodríguez* case.<sup>82</sup> The case involved the disappearance of Manfredo Velásquez, a university student in Honduras who was "violently detained without a warrant for his arrest by members of the National Office of Investigations and G-2 of the Armed Forces of Honduras."<sup>83</sup> He was taken to a known location and accused of alleged political crimes, and subjected to harsh interrogation and cruel torture. Both the police and security forces denied that he had been detained.

Importantly, in deciding the case, the Court examined the

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80. Velásquez Rodríguez, *supra* note 72, at ¶ 166.

81. See U.N. Econ. & Soc. Council (ECOSOC), Comm'n on Hum. Rts. (UNHCR), *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶¶ 19-29, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (prepared by Yakin Ertürk) [hereinafter UNHCR Ertürk Report], available at <http://www.unhcr.org/refworld/docid/45377afb0.html>.

82. Velásquez Rodríguez, *supra* note 72.

83. Velásquez Rodríguez, *supra* note 72, at ¶ 2.

broader context in Honduras at the time of the events and concluded that the disappearance of Velásquez took place as part of the systematic disappearances carried out by military personnel or the police or persons acting under their orders.<sup>84</sup> As a prominent feminist scholar emphasizes, "[b]y recognizing the prevalent social conditions behind the case, the court took significant steps towards transforming human rights law."<sup>85</sup>

The Court explained that an

illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not yet been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>86</sup>

Furthermore, the

State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>87</sup>

Thus, the standard set by *Velásquez* is that if the State's apparatus acts in a manner that allows for violations to go unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.<sup>88</sup> In other words, the State has failed to act with due diligence.

#### ***D. Application of the Due Diligence Standard in Gender-based Discrimination and Violence Cases***

The development of the jurisprudence that holds States responsible for human rights violations committed by third parties

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84. *Id.* at ¶ 147.

85. Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 113 (1993).

86. Velásquez Rodríguez, *supra* note 72, at ¶ 172.

87. *Id.* at ¶ 174 (emphasis added).

88. *Id.* at ¶ 176.

has tremendous consequences for vindicating violations of women's human rights, as the majority of gender-specific human rights violations are committed by non-state actors. The Inter-American Commission, in particular, set an early precedent in applying the due diligence standard in cases of gender discrimination.

The Inter-American Commission applied the powerful framework developed in *Velásquez* in another important women's rights case, when it held the Government of Brazil liable for its lack of adequate protection to a victim of domestic violence. In the case of *María da Penha Maia Fernandes*,<sup>89</sup> the Commission took great steps in advancing the jurisprudence regarding the due diligence standard. The facts of the case are dramatic: In 1983, *María da Penha Maia Fernandes*' husband, *Marco Antônio Heredia Viveiros*, attempted to kill her by shooting her while she was asleep. She survived, but suffered irreversible paraplegia in addition to other physical and psychological trauma. When she returned from the hospital, Mr. *Heredia Viveiros* attempted to electrocute her in the bath. Due to her injuries, Ms. *Fernandes* suffered a loss of independence; she required ongoing physical therapy, medication, and medical attention. She received no financial assistance from her ex-husband to cover her medical expenses, nor the alimony stipulated in their separation order.

The public prosecutor filed criminal charges against Mr. *Heredia Viveiros*, but the case languished on for eight years before he was found guilty and sentenced to ten years in prison.<sup>90</sup> The defense filed a time-barred appeal, which the court considered, vacating the prior decision. The second trial also found Mr. *Heredia Viveiros* guilty and sentenced him to ten years.<sup>91</sup> A subsequent appeal had not been decided upon at the time the Inter-American Commission on Human Rights considered the case, despite the fact that fifteen years had elapsed since the charges were brought. Mr. *Heredia Viveiros* remained free from custody throughout the fifteen years.

Much like the Court had done in *Velásquez*, the Inter-American Commission on Human Rights did not limit their analysis to the narrow set of facts; instead, the Commission took into account the wider context in which the violence occurred, and found that the

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89. *María da Penha*, *supra* note 78.

90. *Id.*

91. *Id.*

case of *María da Penha* could be viewed as “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors.” *María da Penha* involved “not only [a] failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.”<sup>92</sup>

It is worth noting that in *María da Penha* the Commission cited two of its own reports, *Report on the Situation of Human Rights in Brazil 1997* and *Report on the Status of Women in the Americas 1998*, as well as reports issued by several NGOs.<sup>93</sup> These reports allowed the Commission to broadly contextualize what might otherwise have been viewed as an isolated case of domestic violence, not within the jurisdiction of the regional tribunal. Instead, the reports backed the Commission's finding that the individual case before it was not an isolated violation, but represented systemic inadequacies in the State's response to gender violence and was thus able to find a violation in the specific case before the Commission.

If the reports had not been considered and the Commission had only examined the evidence directly related to the plaintiff before it, that is, if they had taken a more “formalistic” approach, the Commission would have had to confine the analysis to the discrete set of facts before it, leaving the complaint devoid of context and thus the broader societal implications that the case represented. Fundamental to finding the State responsible for the lack of an adequate system to protect women from such gender violence was the ability to see the case within this context; to have limited the scope of the inquiry would have left the systemic nature of the violation invisible and thus possibly without any basis for affirming State responsibility. In the end, the Commission concluded that Brazil had failed to exercise due diligence to prevent and respond to domestic violence, and the State was held liable for the human rights violations suffered by the plaintiff.

Most recently, the Inter-American Court condemned Mexico in a landmark decision regarding the responsibility of the state for the violent deaths of three women within a context of systematic gender discrimination and gender violence in Ciudad Juarez.<sup>94</sup>

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92. *Id.* at ¶ 56.

93. *Id.* at ¶ 36, fn. 9.

94. *Case of González et al. (“Cotton Field”) v. Mexico*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 205, at ¶ 258 (Nov. 16, 2009), available at <http://www.corteidh.or>

In an exhaustive decision regarding the obligations of the state, the Court affirmed that “states should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints.”<sup>95</sup>

### *E. Expansion of the Due Diligence Standard*

The notion of utilizing due diligence as the standard to determine State responsibility for gender violence was further advanced in several important international human rights documents, expanding its relevance beyond the Inter-American system. Several developments in the 1990s in particular brought greater attention to gender-specific violence, and many of the ensuing documents referenced a due diligence standard.

General Recommendation Number 19, issued by CEDAW, explains that “discrimination under the Convention is not restricted to action by or on behalf of Governments” and that “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>96</sup>

This was then echoed in the Declaration on the Elimination of Violence against Women, adopted by the United Nations General Assembly in 1993.<sup>97</sup> This Declaration urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>98</sup>

The 1994 establishment of the United Nations Special

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.cr/docs/casos/articulos/seriec\_205\_ing.pdf.

95. *Id.*

96. U.N. Comm. for the Elimination of All Forms of Discrimination Against Women [CEDAW], *General Recommendation No. 19: Violence Against Women*, ¶ 9, U.N. Doc. A/47/38 (Jan. 29, 1992), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003).

97. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/Res/48/104 (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

98. *Id.* at art. 4(c).

Rapporteur on Violence against Women, Its Causes and Consequences, also marked an important development in the use of the due diligence standard to measure government responsibility in relation to gender violence. Radhika Coomaraswamy, the first person to be appointed to carry out the Special Rapporteur's mandate, greatly furthered the thinking in this field. Her 1996 report includes an extensive analysis of the application of due diligence to situations of domestic violence: "Under international human rights law, Governments are not only obliged to refrain from committing human rights violations but also to prevent and respond to human rights abuses, without discrimination."<sup>99</sup> She explains that, increasingly, international legal interpretations and norms are evolving to define "more clearly the positive role and responsibility of the State in preventing abuses perpetrated by para-State or private actors."<sup>100</sup> Consequently, once it is established that there has been a violation of a human right, "by definition, a State can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights."<sup>101</sup>

More recently, the Committee in charge of monitoring implementation of the CEDAW applied this idea in one of its first decisions under the Optional Protocol.<sup>102</sup> In *A.T. v. Hungary* (2005), the Committee found that the State party had failed to meet its responsibilities under several articles of the CEDAW. The due diligence standard "clearly informed the way in which the Committee determined that the State had failed to fulfill the obligations specified in the CEDAW to prevent the violence against

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99. U.N. Econ. & Soc. Council, Comm'n on Hum. Rts. [UNHCR], *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶ 30, U.N. Doc. E/CN.4/1996/53 (Feb. 6, 1996) [hereinafter *UNHCR Coomaraswamy Report*], available at <http://www.unhcr.ch/huridocda/huridoca.nsf/0/0a7aa1c3f8de6f9a802566d700530914?OpenDocument>.

100. *Id.* at ¶ 31.

101. *Id.* at ¶ 32.

102. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 6, 1999). The Optional Protocol allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights.

A.T. and to protect her against its consequences.”<sup>103</sup> The Committee examined whether the State had failed in its duty to provide the applicant with effective protection from the serious risk to her physical integrity, physical and mental health, and her life from her former common law husband. In its decision, the Committee used General Recommendation Number 19 to provide context for the decision.

The due diligence standard has been applied or used as a tool to measure State responsibility in other circumstances as well. The Committee on the Elimination of all Forms of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, and the Human Rights Committees have elaborated on the requirements of the due diligence standard as it relates to specific country situations.<sup>104</sup> The use of the due diligence standard can also be found in the United Nation's Economic and Social Council's (ECOSOC) *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, which state that “[s]tates have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.”<sup>105</sup> At a regional level, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém de Para) also requires States to “apply due diligence to prevent, investigate and impose penalties for violence against women.”<sup>106</sup>

#### ***F. Case Law from the European Court of Human Rights***

The European Court of Human Rights has also utilized the due diligence standard in various circumstances when interpreting the rights found in the ECHR. A handful of cases have employed the due diligence standard, though it is not named as such. The jurisprudence of this court is particularly important in the example provided throughout this paper, as these decisions are binding on Spain.

In 1998, the European Court of Human Rights used a variation of the standard in *Osman v. United Kingdom*.<sup>107</sup> In determining

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103. UNHCR *Ertürk Report*, *supra* note 81, at ¶ 23.

104. *Id.* at ¶ 28.

105. ECOSOC, *supra* note 7, at ¶ 2.

106. *Convention of Belém do Pará*, *supra* note 78, at art. 7(b).

107. UNHCR *Ertürk Report*, *supra* note 81, at ¶ 22.



whether there had been a violation of Article 2 of the ECHR (the right to life), the Court examined the positive obligations of the State to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another person.<sup>108</sup> The Court did not question whether such a positive obligation indeed existed, but rather centered its analysis on the scope of the obligation:

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the life in the context of their above mentioned duties ... it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of the real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>109</sup>

The European Court of Human Rights reiterated this standard in the subsequent case, *Z. and Others v. United Kingdom*.<sup>110</sup> Here, the Court was considering whether there had been a violation of Article 3 of the ECHR (freedom from torture or inhuman or degrading treatment or punishment). The Court

reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill treatment administered by private individuals.<sup>111</sup>

In *E. and Others v. United Kingdom*,<sup>112</sup> the Court reiterated the

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108. *Osman v. United Kingdom*, App. No. 23452/94, 1998-VIII Eur. Ct. H.R. §115 [hereinafter *Osman*].

109. *Id.* at ¶ 116.

110. *Z. and Others v. The United Kingdom*, App. No. 29892/95, 2001-V Eur. Ct. H.R. [hereinafter *Z and Others*].

111. *Id.* at ¶ 73.

112. *E. and Others v. The United Kingdom*, App. No. 33218/96, Eur. Ct. H.R. (2003).

holding in *Z. and Others*, emphasizing that the State is required to take measures designed to ensure that individuals within their jurisdiction are not subject to torture or inhuman or degrading treatment, including treatment by private individuals, and that "these measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which authorities had or ought to have had knowledge."<sup>113</sup>

Most recently, the European Court of Human Rights in a case against Turkey examined "whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures."<sup>114</sup> In this case, the applicant and her mother suffered extensive abuse at the hands of her husband and his father, which resulted in the homicide of the applicant's mother. The applicant filed several complaints with Turkish authorities, who finally sentenced the abuser for homicide and illegal possession of a firearm. Nevertheless, the court reduced his sentence from 15 years to 10 months imprisonment and a fine, stating that the deceased had provoked the assault. The European Court of Human Rights found the response of the national authorities to be manifestly inadequate and found that Turkey had violated the rights to life, to be free from torture, and the prohibition against gender discrimination, as defined by the ECHR.

As is evident from the case law in both regions, the standard for establishing State complicity in violations committed by private actors is more relative than when the violation is a consequence of a direct act by State agents. Accordingly, "complicity must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action."<sup>115</sup>

As the current United Nations Special Rapporteur on Violence against Women, Yakin Ertürk, explains, "on the basis of the practice and the *opinio juris* ... it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence."<sup>116</sup> It is clear from this review of State responsibility for violations

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113. *Id.* at ¶ 88.

114. *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. ¶131 (2009).

115. UNHCR *Coomaraswamy Report*, *supra* note 99, at ¶ 33.

116. UNHCR *Ertürk Report*, *supra* note 81, at ¶ 29.

committed by non-state actors that Spain has an obligation under regional and international law to act with due diligence to protect and promote human rights in general, and rights of trafficked women in particular. The following section will analyze what this due diligence requires in the specific case of trafficked women.

#### IV. Applying a Due Diligence Standard

Recommendations, guidelines, and suggested actions regarding the rights of trafficked women are plentiful in national, regional, and international instruments. These instruments set out the measures that transit and receiving states must develop and implement to protect the rights of trafficked women. However, it is clear that the current legal and policy framework in Spain, as in other receiving states, does not adequately protect trafficked women from further human rights violations, or provide access to remedies for the human rights violations already suffered. International and regional efforts to date have failed to develop an enforceable scheme to hold individual States accountable. Furthermore, the presently available protections in Spain fall short of offering effective means for trafficked women to remain legally in the country.

Trafficking of human beings for exploitation is inherently tangled with other highly political and difficult topics for governments — organized crime, immigration, fair labor employment laws, and, undoubtedly, prostitution. At the same time, as with many human rights violations suffered by women, victims of trafficking are often an invisible sector of the population, with no political access or power. It is for these reasons that developing an enforceable model to vindicate the rights of this population cannot be left to the political will of governments. Both national laws and international norms fail “to serve as a constructive force to protect or to improve the condition of female migrants.”<sup>117</sup> This is especially true for trafficked women.

Without a legal framework that holds States accountable when they systematically fail to protect victims of trafficking within their jurisdictions, the rights of women will continue to be a secondary issue for governments focused on crime and immigration control as their primary concern. This section sets forth a new option that has not yet been explored as a means of assessing State responsibility

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117. Fitzpatrick & Kelly, *supra* note 29, at 56.

regarding trafficked women. Again using Spain as an illustration, this paper presents and analyzes the potential for creating a framework utilizing the due diligence standard to outline the specific State obligations towards trafficked women. As Special Rapporteur Ertürk explains, “[t]he potential of the due diligence standard lies in a renewed interpretation of the obligations to prevent, protect, prosecute and provide compensation and map out the parameters of the responsibility for State and non-State actors alike in responding to violence.”<sup>118</sup>

### A. *Specific Requirements of Due Diligence*

As discussed in section three, the due diligence standard has been utilized over the past 10 years by international courts and human rights bodies to outline a core set of obligations that a State must meet in relation to some aspects of gender violence, most specifically domestic violence. From this jurisprudence, the key elements regarding due diligence have been specified. In order to determine whether a State is exercising due diligence in protecting a certain right or set of rights from infringement by non-state actors, it is necessary to examine whether the violations have taken place with the support, acquiescence, or knowledge of the State. The Inter-American Commission clearly laid out this principal in *Velázquez*, explaining that what is “decisive is whether a violation of the rights recognized by the [applicable human rights convention] has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”<sup>119</sup>

Additionally, the standard for establishing State complicity in violations committed by non-state actors requires an additional step than when the violation is committed by the State. With trafficking, mafias or networks that are non-state actors perpetrate the original violation; State responsibility comes from either direct support or more passive knowledge and acquiescence. Though at times it can be difficult, State “[c]omplicity must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action.”<sup>120</sup> Thus, in order to determine whether a State is

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118. UNHCR Ertürk Report, *supra* note 81, at ¶ 103.

119. Velásquez Rodríguez, *supra* note 72, at ¶173.

120. UNHCR Coomaraswamy Report, *supra* note 99, at ¶ 33.

meeting a due diligence standard in the protection of trafficking victims, it must first be established that the State is aware of the pattern of abuse inflicted upon victims.

More than sufficient evidence is available to demonstrate that Spain (along with other receiving states in Western Europe) is aware of the violations suffered by trafficked persons. The risks that women face in Spain and other receiving countries once they manage to escape their traffickers, or after networks are dismantled, are also well known and publicized.<sup>121</sup> These threats include the risk of falling back into the hands of traffickers within the receiving State or the possibility of deportation to the country of origin, where women face a host of additional possible human rights violations. It is crucial to recall that often the circumstances in which women are trafficked also amount to inhumane and degrading treatment. Women are held in slave-like conditions without liberty of movement. They are subject to physical abuse, including rape, and are forced into prostitution. Furthermore, the women's families may also be the victims of threats or violence in the country of origin.

### ***B. Due Diligence and the Obligation to Prosecute***

Despite its potential relevance, a due diligence standard has not been considered as a framework for defining State obligation to protect trafficked women and offer them effective remedies. However, a due diligence standard has been employed to examine other State obligations in the field — for example, the obligation of the State to prosecute traffickers.<sup>122</sup> Furthermore, the obligation to prosecute traffickers is clearly set forth in the UN Protocol on Trafficking.<sup>123</sup> Article 5 of this Protocol directly references State obligations, utilizing mandatory language: “Each State party *shall adopt* such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 [definition of trafficking] of this Protocol, when committed

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121. See, e.g., Office of the High Comm'n for Human Rights [OHCHR], Committee on the Elimination of Discrimination Against Women, *Concluding Observations Adopted at the 31st Session*, ¶¶ 336-37, CEDAW/C/ESP/5 (July 7, 2004), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/SpainCO31.pdf>.

122. See Jennifer Murray, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of the United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. REV. 475 (2003).

123. G.A. Res. 55/25, Annex II, *supra* note 9.

intentionally.”<sup>124</sup>

Both national and international norms mandate prosecution of the traffickers. This is both a reflection of the crime control framework that is prevalent in the field of trafficking and a result of political pressure to focus on this aspect of the issue. The emphasis on prosecution also points to the location of political will at both the national and international levels. Although the investigation and subsequent prosecution of traffickers is a crucial element in protecting victims, a crime control framework does not focus on protecting the human rights of women as a principal objective, thus leaving the victims of trafficking vulnerable to further violations. While there continues to be a lack of political will to create a legal framework that offers real protection to victims of trafficking, it is necessary to find ways to hold States accountable for this lack of action.

### C. *Due Diligence and the Obligation to Protect*

Though the UN Protocol mandates legislation to prosecute traffickers, both national and international laws leave a gap with respect to protecting women. Moreover, while the UN Protocol advances some notions of protection for trafficked women, it leaves the decisions and actions to be taken to the State's discretion. This is clearly seen in Article 6 of the Protocol regarding “assistance to and protection of victims of trafficking in persons,” which reads in part: “Each State Party *shall consider* implementing measures to provide the physical, psychological and social recovery of victims of trafficking in persons.”<sup>125</sup> Article 7, regarding the status of victims of trafficking in persons in receiving states, uses similar language: “In addition to taking measures pursuant to article 4 of this Protocol, each State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in person to remain in its territory, temporarily or permanently, in appropriate cases.”<sup>126</sup>

Thus, the provisions regarding the protection and provision of services — as well as the legal status a woman may be granted once she is in a receiving State — are left to the discretion of each State

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124. *Id.* at art. 5(1) (emphasis added).

125. *Id.* at art. 6 (emphasis added).

126. *Id.* at art. 7 (emphasis added).

Party to the Protocol. The Protocol consequently fails to set a minimum standard of protection that must be afforded to trafficked women. This lack of a threshold is problematic for several reasons — making minimum standards discretionary leaves both victims and States uncertain about their rights and obligations, respectively. At the same time, the possibility of receiving real protection and remedies is dependent on the political will of those in power. As the Special Rapporteur on Violence has explained:

The international community has, since the early 1900s, classified trafficking of women as a serious abuse of women .... Over time thinking about trafficking has changed, as have the strategies through which trafficking is addressed .... Irrespective of the means of redress, however, one thing has remained constant — the lack of political will in terms of guaranteeing the human rights of trafficked women.<sup>127</sup>

This lack of political will, exacerbated by the lack of political voice of these otherwise “invisible” immigrants, leaves most women unprotected and uncertain about the possibility of attaining the legal status that would allow them access to social services and legal advice regarding their options.

The consequences of leaving these decisions to the State's discretion are evident in Spain. In this case, the protections are insufficient and leave the majority of women who have been trafficked in situations of complete vulnerability. For this reason it is necessary to establish, using the due diligence standard, a minimum set of protections that must be given to trafficked women.

***D. A Due Diligence Standard to Protect Trafficked Women: Legal Residency as a Minimum Threshold***

Utilizing a due diligence standard to define the obligations that Spain and other receiving states have to trafficked women within their jurisdiction offers an invaluable methodology for setting the minimum core standards that States must meet in order to comply with their obligations under international human rights law. Examining legal obligations under this scheme demonstrates that States must have a framework in place to offer legal residency so that women who have been trafficked — and thus are vulnerable to severe human rights violations — have access to remedies and to

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127. Human Rights of Women, *supra* note 26, at ¶ 79.

protection from further human rights violations.

Whenever attempting to define a framework of legal obligations — a minimum that must be met by the State — it will always be difficult to create a standard that can be enforced in diverse contexts. However, this is not a sufficient deterrent from the task of setting tangible standards, as a right can be enforceable, that is, justiciable, and then adapted to a particular domestic situation.

Minimum obligations can be delineated, leaving the details of the legal framework to the discretion of each national legislature. An example of this can be seen in *Airey v. Ireland*, which came before the European Court of Human Rights.<sup>128</sup> The plaintiff, a victim of domestic violence, claimed a violation of her right to a fair trial due to her inability to pay an attorney, which was mandatory in order to obtain a divorce. The Court did not mandate a comprehensive scheme of legal services for low-income applicants, but rather explained that States are required to make general provisions for such circumstances, so that they can avoid a human rights violation.

Existing principles and jurisprudence offer a foundation on which to build a due diligence standard of protection for trafficked women. Most obviously, general guiding principles can be found in ECOSOC's Recommended Principles and Guidelines on Human Trafficking.<sup>129</sup> This United Nations document explains that "States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons."<sup>130</sup> The complexity comes in defining, in detail, what this due diligence entails in order to construct a working model to enforce rights.

Without the ability to enforce specific rights, the rights remain indefinite. Yakin Ertürk notes that because "very little information is available regarding State obligations to provide adequate reparation for acts of violence against women .... [T]his aspect of due diligence remains grossly underdeveloped."<sup>131</sup> Since "[t]he concept of due diligence describes the level of effort a state must take to fulfill its responsibilities to protect individuals from human rights abuses,"<sup>132</sup> those efforts must be described in detail in order

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128. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979).

129. ECOSOC, *supra* note 7.

130. *Id.* at ¶ 2 (emphasis added).

131. UNHCR Ertürk Report, *supra* note 81, at ¶ 55.

132. Murray, *supra* note 121, at 515.



for the due diligence standard to have any real meaning. It is important to note that the obligations set forth here as a suggested minimum standard are exactly that, a minimum; each State may then offer more rights and protection to trafficked women.

More specific guidance regarding State obligations can be found in the case law of the European Court of Human Rights – decisions that are binding on Spain and the other signatories to the ECHR. According to this jurisprudence, a State is required to take measures designed to ensure that individuals within their jurisdiction are not subject to torture or inhuman or degrading treatment, including acts by state or non-state actors. Special attention should be paid to people in vulnerable positions.

Attaining legal residency, whether temporarily or with the ability to remain for longer periods in a country, is the threshold for accessing a host of rights to which trafficked women are entitled under international human rights law. In addition to not having access to state-sponsored services such as health care, a person lives in a highly vulnerable situation without legal residence in a country. Without a residence permit it is impossible to work legally, which leaves those without legal status marginalized and in a precarious economic condition. Employers who hire people without residence permits sometimes use the threat of deportation to exploit the workers; this also keeps women from denouncing gender violence to authorities. In the case of women who have been trafficked for sexual exploitation, the inability to work legally often leads them back to prostitution as their sole means of survival.<sup>133</sup> People without legal status also face the risk of deportation. In the case of trafficked women, this could mean a return to their country of origin, where they risk falling back into the hands of traffickers, being returned to families which sold them into the trafficking network, returning to situations of rejection by society when it is known that the women were exploited for prostitution, or a myriad of other situations that expose women to discrimination and violence.

Therefore, a threshold for accessing any rights in the receiving state is the ability of trafficked women to be in the country legally. Consequently, in order to meet due diligence, Spain must develop a

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133. Because trafficked women often do not know anyone in the country other than their traffickers, this option has a high probability of having them fall back into the hands of the trafficking network.

scheme that permits women to obtain some sort of legal residency in the country. The Toolkit to Combat Trafficking in Persons (created by the United Nations) explains that, "[i]n the destination State, assistance and protection services for victims of trafficking cannot be offered effectively if the victims are not granted a reflection period or temporary residence status or if they are being criminalized because of their irregular residence or employment status."<sup>134</sup> A reflection period is contemplated in European legislation; a European Council Directive states that "[m]ember States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can make an informed decision as to whether to cooperate with the competent authorities."<sup>135</sup>

At the present time, there is no binding obligation to give legal residence to trafficked women who opt to stay in receiving countries. Without such a requirement, victims of trafficking are not offered protection or the possibility to seek remedies for the severe human rights violations suffered. Thus, any receiving state, such as Spain, that does not allow victims to remain legally in the country for some period of time are *per se* failing to meet due diligence, since it is not possible for a state to meet any of its obligations under international law to protect the rights of trafficked persons without this threshold measure.

The State retains discretion for determining the scheme by which this legal residence is granted. The most common available approach is to allow for a reflection period. A reflection period serves numerous purposes — it provides the victims of trafficking with the potential to begin to "recover" from their experience and make an informed decision about the options available to them in their particular situation. This time also gives those with an irregular immigration status access to appropriate assistance and support such as secure housing, physiological counseling, medical and social services, and access to legal aid. Nonetheless, reflection

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134. UNITED NATIONS OFFICE ON DRUGS AND CRIME [UNODC], TOOLKIT TO COMBAT TRAFFICKING IN PERSONS: GLOBAL PROGRAMME AGAINST TRAFFICKING IN HUMAN BEINGS 118 (2006), available at [http://www.unodc.org/pdf/Trafficking\\_toolkit\\_Oct06.pdf](http://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf).

135. Council Directive 1004/81, art. 6, 2004 O.J. (L 261) (EC), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0081:EN:HTML>.

periods tend to be insufficient due to their short duration (typically 30 to 45 days), after which women are again left without protection.

Many states, like Spain, condition residence on the trafficked person's cooperation with law enforcement. This generally accepted model (used by both the national and international community and reinforced in many legislative documents) is highly questionable and does not meet the due diligence standard. It is, in fact, a fundamentally flawed principle — it is difficult to think of another human rights scheme that requires a person to testify in court in order to access internationally recognized human rights. States must ensure that trafficked people are protected from “further exploitation and harm and have access to adequate physical and psychological care.”<sup>136</sup> Under no circumstance should this care be conditioned on the capacity or willingness of the trafficked person to cooperate in legal proceedings.

To meet due diligence in the protection of trafficked women, Spain and other receiving and transit states need to develop a legal framework that allows trafficking victims to obtain legal residency. In order to determine which individuals are entitled to such a residency permit, a State could initiate a victim certification process. Such a process may be necessary due to the difficulties that trafficking victims have in establishing their status as victims. Spain might consider developing a scheme to confirm “victim status.” This could involve allowing courts or tribunals that are responsible for convicting traffickers to certify victims, or allowing judicial or administrative determinations to be made based on the application of a law enforcement or border control official, a personal representative, or an NGO.<sup>137</sup>

## V. Conclusion

Thousands of women in Spain are or have been victims of trafficking for sexual exploitation. Through their law enforcement agencies, States actively investigate and prosecute traffickers involved in the mafias and networks that are responsible for the human rights violations suffered by trafficked persons. However, once traffickers are detained or when women manage to escape the

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136. ECOSOC, *supra* note 7, at ¶ 8.

137. See UNODC, *supra* note 134, at 115 (for a description of how to develop a victim certification process).

violent mafias, most find themselves in a legal vacuum — unable to legally remain in the country and thus with no access to services to guarantee their rights. Avenues are also unavailable to pursue remedies for the gross human rights violations already suffered.

Spain and other transit or receiving states for trafficked persons have signed a host of regional and international treaties that obligate them to offer protection and remedies to trafficking victims within their jurisdiction. However, as this paper has demonstrated, these options are insufficient — both due to a lack of a comprehensive means of protecting women and because of the manner in which the existing options are applied and enforced. This leaves women who have been victims of severe human rights violations unable to access remedies — and simultaneously exposed and vulnerable to re-victimization.

This paper advocates the use of a due diligence standard as a framework to set minimum obligations a State must meet to adequately protect the rights of trafficked women and to make remedies accessible to this population. The current lack of an adequate legal framework in Spain, combined with the fact that the State is clearly aware of the situation of trafficked women in its territory, demonstrates that Spain is not acting in due diligence and thus could be held liable for this violation.

An examination of the situation of trafficked women in Spain, as a receiving country, reveals that the due diligence standard requires that the State create a legal framework that provides effective mechanisms to offer temporary or permanent legal residence to victims of trafficking, including adequately certifying their situation. Until such a scheme is created and implemented, Spain and other receiving countries in similar situations are falling short of meeting their legal obligations to respect, protect, and ensure the human rights of those under its jurisdiction. This failure leaves a highly vulnerable population in dire straits.

## **VI. Appendix A: A Case Study on Inadequacies of Refugee Status as an Effective Protection for Trafficking Victims**

A recent case in Spain exemplifies the difficulties facing victims of trafficking. This particular situation concerns a woman who was trafficked to Spain for sexual exploitation, filed for asylum, and had

her claim denied. Liliana,<sup>138</sup> a 20-year-old Eastern European woman, was contacted several times by a man who lived in her neighborhood in a small town. She was unemployed and lacked funds to continue her studies. The man offered her employment as a dancer at a discotheque in a nearby city. She was told that the job would only entail professional dancing. At first she hesitated; however, her dire financial situation and lack of opportunities, as well as his promises, led her to accept the job.<sup>139</sup>

Without her knowledge, this man sold her to a pimp, who had other girls working for him. Liliana began working, and indeed she was not asked to do anything other than dance in a disco. During this initial period she was not treated badly, nor was her liberty restricted; she was paid her salary and given housing (for herself and for the other three girls who had been purchased by the pimp). After two months, the disco where they worked was scheduled to close for the season. The pimp suggested that the women go to Spain to do the same type of work. Liliana accepted the offer as well as the money that he offered to let her borrow for travel expenses and to obtain a passport.

Once in Spain, the pimp took them to a club that was owned by a man from the same country as Liliana. The employment circumstances were quite different: The girls had to dance as well as have sexual relations with the clients. Liliana refused to have sexual relations with the clients, but the pimp forced her to do so by telling her that he had bought her, and thus she was obligated to comply. At this point, he began to threaten and abuse her, verbally and physically. Furthermore, she was kept locked up in the club where she worked. After about two months, the pimp severely beat her, leaving marks on her body. Liliana never received medical care, and she was not paid for any of her work in Spain. In addition to being forced to have sexual relations with clients, she was coerced into taking drugs and stripping in the club.

With the help of a man who worked at the club as a cook, she managed to escape and filed a complaint with the Spanish national police. An NGO assisted her with shelter and medical care. Another (international) NGO was informed of the situation of this woman (and others living in the same area of Spain) by the Spanish

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138. Liliana is a pseudonym.

139. Women's Link represented this woman. Author has all the information in her files. See *supra* note 19.

branch of the UNHCR. With the assistance of this international NGO, Liliana filed for asylum in Spain in November 2005 based on gender discrimination. At the time that she filed her claim, Liliana knew her pimp in Spain had been a police officer in her country of origin and had connections there. She feared deportation because he could find her if she were to be sent home. If she were to return, he could re-traffic her (internally in her country of origin or abroad to other countries) or have her killed. She feared that the authorities in her country would not provide her with effective protection, especially once she filed a complaint against him for trafficking her.

Her claim was admitted in January 2006. In October 2006, the network/mafia that had brought Liliana to Spain was dismantled by the special immigration brigade of the national police. In late November 2006, Liliana was contacted by a police officer informing her and a friend with whom she had escaped that they needed to testify in a court proceeding. During this process, she was not informed of any rights she had of using a pseudonym, of testifying behind a curtain, or of having her voice distorted so that she could not be identified by her traffickers.

In January 2007, before a decision was handed down on her asylum application, Liliana's country of origin became a member of the EU. Thus her claims fall under the Protocol on Asylum for Nationals of Member States of the EU (annexed to the Treaty of Amsterdam establishing the European Community), since it applies to EU Member States considering claims made for asylum by nationals of other EU Member States.<sup>140</sup> This Protocol nullifies the already slim chance that a victim of trafficking had to receive refugee status, leaving the victim to navigate the complicated and arbitrarily applied immigration laws in Spain, which require participation in the criminal proceedings. Furthermore, had a case not been instigated against her traffickers, Liliana would find herself without any protection. In February 2007, Liliana's claim for asylum, as well as for subsidiary protection, was denied.<sup>141</sup>

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140. Apparently (according to confidential information provided to her attorneys), the government was sitting on her claim with the knowledge that once the applicant's country of origin became a EU member, the denial of asylum could be easily justified under the Protocol, without the need to examine the validity of the substantive of her application.

141. Liliana is represented by the not-for-profit organization Women's Link Worldwide and will file an appeal to the denial of asylum when official notice is given by the government regarding the denial of her claim.

The real and recent case of this woman who was trafficked to Spain for sexual exploitation is demonstrative of the difficulties faced by women who seek to remain legally in Spain by applying for refugee status under the 1951 Convention, making this mechanism an ineffective tool to protect and ensure the rights of this population. This case also illustrates the current government's reluctance to extend protection to trafficked women.